1932

The Duty of the Husband to Support the Wife

Robert C. Brown
Indiana University School of Law

VIRGINIA
LAW REVIEW

Vol. XVIII JUNE, 1932 No. 8

THE DUTY OF THE HUSBAND TO SUPPORT THE WIFE

NO PART of the law has been more completely transformed in the past century than that relating to husband and wife. The wife has been advanced from her common law position of practically a chattel to one of equality with, if not superior to, that of her spouse. But certain phases of even this branch of law remain substantially unchanged, and of these one of the most conspicuous examples is that relating to the duty of the husband to support the wife. It is entirely clear that the married women's acts in the various states have not substantially affected the binding force of this obligation.[1]

It is believed that the general attitude of the courts, which has just been stated, is justified. True it is that married women are now perfectly free to become self-supporting, and the number who have in fact become wage-earners is so large as to be perhaps somewhat embarrassing in times of financial depression. Nevertheless, the typical wife is still primarily a home-maker, whose function is not to earn but rather to perform the more important work of attending to the physical, mental, and moral welfare of her husband and children. So long as this remains, as it does, the normal situation (even though it may be departed from in very numerous cases) the duty of support which the courts have cast upon the husband is unlikely to be appreciably lightened.

Indeed there is a considerable tendency to extend this duty, or at least to buttress it by creating more effective methods of enforcement. Thus most states have statutes making it a criminal

[1] Grandy v. Hadcock, 85 App. Div. 173, 83 N. Y. S. 90 (1903); Flynn v. Messenger, 28 Minn. 208, 9 N. W. 759 (1881).

offense for a husband to fail without proper excuse to support the wife.[2] Such statutes are generally drawn so as to permit the erring husband to go free provided that he will support the wife in the future, and so are rather coercive than punitive.[3] But proceedings brought under such statutes are criminal in nature and the husband is entitled to the rights of any person accused of a crime.[4]

In addition, several states have made the failure of the husband to support the wife a ground for divorce.[5] This ground is, of course, available only to the wife, and the primary purpose of such statutes is obviously to furnish additional coercion on the husband to do his duty in this respect.

The Nature of the Duty

When the courts were confronted with the problem of enforcing this duty they were obliged to decide as to its nature—or perhaps more accurately they had to decide into which of the categories among which they had attempted to apportion all legal questions, this particular class of cases should be put.

Until comparatively recently the courts seem to have been unanimous in their answer to this problem. This answer was that it falls within the principles of the law of agency—that is, that the wife acts as the agent of the husband when she buys those things which she requires, and she can therefore make him liable for the purchase price.[6] There is no question that the wife may be and frequently is the agent of the husband, and even yet many courts see no difference between cases where the wife acts

[2] For typical cases dealing with the construction of these statutes, see State v. Lancaster, 135 S. C. 412, 133 S. E. 824 (1926); State v. Kelly, 100 Conn. 727, 125 Atl. 95 (1924); State v. McPherson, 72 Wash. 371, 130 Pac. 481 (1913); State v. Hill, 161 Iowa 279, 142 N. W. 231 (1913).

[3] Provision is usually made for a suspended sentence during such time as the husband shall actually support the wife, the court in the meantime keeping a strict supervision on his activities and having the power to imprison him for any delinquency. It is often provided, also, that the earnings of a husband in prison for violation of this statute shall be transmitted to the wife.

[4] State v. Lancaster, *supra* note 2.

[5] See Madden, Domestic Relations (1931) 291.

[6] Jones v. Gutman, 88 Md. 355, 41 Atl. 792 (1898); Jolly v. Rees, 15 C. B. N. S. 628 (1864); Reid v. Teakle, 13 C. B. 628 (1853); Houliston v. Smyth, 2 Car. & P. 11 (1825).

with the actual or apparent consent of the husband and those where he is bound even against his protest made known not only to the wife but to those with whom she deals.[7]

As already said, the wife frequently acts as agent for the husband, indeed this is probably one of the most usual agency situations. It seems that mere cohabitation of the spouses is not sufficient to constitute "holding out" of the wife by the husband so as to make him liable for her purchases.[8] But very little more added to cohabitation, such as paying bills incurred by the wife, will subject the husband to liability for subsequent bills.[9] It should be noted that the husband's liability is not limited to purchases of necessities of the wife and family; he is liable for ordinary and reasonable family expenses even though these extend beyond what can be considered as strictly necessary.[10] The wife may even be held out by her spouse as having wider authority, so that she may bind him for expenses wholly outside the household;[11] but here the fact that the alleged agent is his wife will not generally subject the principal to any other or greater liability than if this were not the case.[12]

The wife herself when she acts as agent for her husband has substantially the same rights and liabilities as any other agent. At common law, she cannot of course be liable on any warranty of authority;[13] but it would seem that modern statutes, which subject married women to full contract liability, at least as respects others than their husbands, have changed this rule.

The scope of the wife's agency is likewise governed by ordi-

[7] Broun v. Durepo, 121 Me. 226, 116 Atl. 451 (1922). See 1 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed., 1921) 124.

[8] Debenham v. Mellon, L. R. 6 A. C. 24 (1880).

[9] Gilman v. Andrus, 28 Vt. 241 (1856).

[10] Flynn v. Messenger, *supra* note 1.

[11] Gates v. Bower, 9 N. Y. 205 (1853) where the husband was held liable to pay for horses purchased by the wife for work on the farm which the husband was permitting the wife to manage.

[12] Benjamin v. Benjamin, 15 Conn. 347 (1843). Here the husband was held not bound by the action of his wife in selling farm produce in payment of the debt of the husband, although the wife was in full charge of the farm operations and could clearly have made a sale of the produce in the ordinary course.

[13] Smout v. Ibery, 10 M. & W. 1 (1842). See 1 WILLISTON, SALES (2nd ed., 1924) 78.

nary principles. While, as already pointed out, the husband is liable for more than mere necessities, yet, unless through actual authorization, he is not liable for purchases so extravagant in accordance with the circumstances of the family as to throw an obvious doubt on her authority to make them.[14] Yet the fact of previous acquiescence in previous similar purchases may subject the husband to liability for the wife's extravagances even though they have no relation to family matters.[15] It has been held in England that a husband cannot enjoin the wife from buying even extravagantly on his credit;[16] but this very unfortunate result is derived from the assumption that the acts of a wife are purely tortious. Even admitting this rather dubious point, the tort seems to relate to property rights (the husband's credit) as to which each spouse is entitled to protection from the other; and the fact (if it is a fact) that the husband cannot get damages for this wrong to him seems no reason why he should not be able to enjoin it. The decision, therefore, seems unsound.

A true agency of the wife for the husband can obviously be revoked like any other agency.[17] And when the wife assumes to bind her husband, but without actual or apparent authority to do so, he may nevertheless be bound by ratification, and this is so even though it is authoritatively determined that the purchases were not necessary or even proper.[18]

The scope of the agency of the wife for the husband is thus very wide, but it is not wide enough to include support in its real sense. It is true that there is judicial recognition in other connections of the power of the law to appoint a compulsory

[14] Lane v. Ironmonger, 13 M. & W. 368 (1844); Freestone v. Butcher, 9 Carr. & P. 992 (1840); Seaton v. Benedict, 5 Bing. 28 (1828).

[15] M'George v. Egan, 5 Bing. N. C. 197 (1839) where the husband was compelled to pay school expenses of his wife's niece, because he had previously paid similar charges without protest.

[16] Webster v. Webster, (1916) 1 K. B. 714.

[17] Etherington v. Parrot, 2 Ld. Raym. 1006 (1703). See Cowell v. Phillips, 17 R. I. 188, 20 Atl. 933 (1890).

[18] Conrad v. Abbott, 132 Mass. 330 (1882); Day v. Burnham, 36 Vt. 37 (1863); Ogden v. Prentice, 33 Barb. (N. Y.) 160 (1860). In Mickelberry v. Harvey, 58 Ind. 523 (1877) the wife purchased certain furniture which was not necessary, because the family was already sufficiently supplied. It was held that the husband could nevertheless be held for it because of his ratification of the wife's purchase.

agent for one whom it is desired to hold to a certain liability;[19] but this is clearly a most awkward and unrealistic way to handle the matter. Agency is primarily consensual, and the husband who is compelled to pay for necessaries purchased by his wife against his own protest made known to the merchant, is held not because his wife acted as his agent, but because the law imposes upon him the duty to support her. There is an increasing recognition by the courts of this sharp distinction between the frequent and genuine agency of the wife for the husband and the limited but important power which she has to bind him to pay for her support, even against his actual or even apparent dissent.[20] Sometimes it is insisted that it is all agency, but that the liability for support is an agency by necessity, a compulsory agency, or something else of that description;[21] but this is an obvious recognition, though clumsily expressed, of this same distinction. The truth is that this obligation of the husband is quasi-contractual in nature; in other words, it is an obligation imposed by law without, and usually against, the husband's consent.[22] It would seem to follow that the husband is liable for only the fair value rather than the actual sale price of necessaries furnished to the wife; but there do not seem to be any authorities which apply this proposition.

The chief practical difference between obligations arising out of this obligation to support and those coming from a genuine agency of the wife is that the husband has no power to relieve himself of the former by the obvious means, such as notice, by which an agent can be deprived of his power to bind the principal. No notice to merchants or others who are supplying the wife with necessities will absolve the husband from the liability

[19] As, for example, when a foreign corporation is required as a condition to doing business in the state, to appoint some state officer as its "agent" for service of process. See Tucker v. Columbia Ins. Co., 232 Mass. 224, 122 N. E. 285 (1919).

[20] See 1 WILLISTON, SALES, 79, and Schouler, *supra* note 7. See also McFerren v. Goldsmith, 137 Md. 573, 113 Atl. 107 (1921); Johnson v. Briscoe, 104 Mo. App. 493, 79 S. W. 498 (1904).

[21] Fisher v. Drew, 247 Mass. 178, 141 N. E. 875 (1924); Woodward v. Barnes, 43 Vt. 330 (1871).

[22] KEENER, QUASI CONTRACTS (1893) 22; WOODWARD, QUASI CONTRACTS (1913) § 203.

to pay for such articles, unless indeed the circumstances are such that the wife is no longer entitled to support.[23] *A fortiori,* notice to the wife, alone, will not absolve the husband,[24] though of course this same rule would often apply in cases of genuine agency. A public notice will therefore relieve the husband for liability on non-necessary purchases by the wife,[25] but, because of his duty to support her, not for her purchases of necessaries.[26]

So long as the husband performs his duty of support, or endeavors in good faith to do so, the method and effect of his performance are very largely in his own discretion. Thus, while necessaries furnished to the wife become presumptively her own property,[27] yet they may be merely lent to her, and the husband's property claim is binding as against the creditors of the wife.[28] But where the husband makes it impossible for the wife to live with him, he can probably not determine her place of residence [29] nor the merchants from whom she shall purchase necessaries.[30] These apparently inconsistent principles can be reconciled by the theory that the husband is to have the general direction of the wife's expenditures which bind him, but not to such an extent as to unduly burden the wife and thus make her right to support ineffective.

The distinction which has been insisted on between true agency and support must be conceded to have less practical effect when the spouses are cohabiting. The husband has, of course, at least

[23] Pierpont v. Wilson, 49 Conn. 450 (1881); Rea v. Durkee, 25 Ill. 414 (1861); Bolton v. Prentice, 2 Str. 1214 (1745).

[24] Vaughan v. Mansfield, 229 Mass. 352, 118 N. E. 652 (1918). The same applies to private communications to any other member of the family. Cothran v. Lee, 24 Ala. 380 (1854).

[25] Woodward v. Barnes, *supra* note 21.

[26] See Walker v. Leighton, 31 N. H. 111 (1855), where the court apparently overlooked this principle by deciding that a merchant could sue a husband who was failing to support his family although the husband had given public notice that he would not be responsible for his wife's purchases, "since there is no proof tending to show that it ever came to his (the merchant's) notice." Under such circumstances, the notice given by the husband is properly to be considered as of no effect whatever.

[27] Masson v. De Fries, (1909) 2 K. B. 831.

[28] Rondeau v. Marks, (1918) 1 K. B. 75.

[29] Kirk v. Chinstrand, 85 Minn. 108, 88 N. W. 422 (1901).

[30] Pattberg v. Pattberg, 94 N. J. Eq. 715, 120 Atl. 790 (1923). But see Kimball v. Keyes, 11 Wend. (N. Y.) 33 (1833).

as great a duty to support a wife who cohabits with him as one who does not; but in case of cohabitation the husband is ordinarily liable, on principles of agency, for the wife's purchases, even though they are not necessaries. No nice distinction between agency and support is therefore generally required.[31] The presumption is that the wife can bind the husband for all her ordinary purchases.[32] But, as already seen, the husband has much greater power to control the wife in the details of such matters when they are cohabiting than when she is justifiably living apart from him;[33] and the mere fact of cohabitation is not conclusive that she has apparent authority to bind him as his agent.[34] More important than all this, the husband may by notice to the tradesmen effectively revoke all actual or apparent authority of the wife to act as his agent without putting an end to their cohabitation. While this does not often happen, yet when it does, the distinction between agency and support is vital though the spouses are still cohabiting; for the husband has, of course, still the duty to support the wife.

Who Is Entitled to Be Supported?

This question seems to admit of a very simple answer. Any wife is entitled to support. Thus, the fact that the spouses were under the legal age of consent will not deprive the wife of the right to support, such a marriage being only voidable and not void.[35] So a common law wife is entitled to support in jurisdictions which recognize such marriages.[36]

More troublesome is the situation where there is cohabitation but no marriage. The problem has arisen in two recent American cases,[37] in both of which the putative wife had been married and that marriage had not been dissolved; but in neither case

[31] Leuppie v. Osborn, 52 N. J. Eq. 637, 29 Atl. 433 (1894); Trotter v. Trotter, 77 Ill. 510 (1875); Johnson v. Briscoe, *supra* note 20.

[32] Adkins v. Hastings, 138 Md. 454, 114 Atl. 288 (1921). But *cf.* Jones v. Gutman, *supra* note 6.

[33] Pattberg v. Pattberg, *supra* note 30.

[34] Debenham v. Mellon, *supra* note 8.

[35] State v. McPherson, *supra* note 2.

[36] Poole v. People, 24 Colo. 510, 52 Pac. 1025 (1898).

[37] Jordan Marsh v. Hedtler, 238 Mass. 43, 130 N. E. 78 (1921); Frank v. Carter, 219 N. Y. 35, 113 N. E. 549 (1916).

was the supposed husband aware of this when the purchases were made. The courts in both instances held the supposed husbands liable. The opinions contain much agency language, but the courts also took comfort from demonstrating to their own satisfaction that the purchases were necessaries. It is submitted that the latter problem was improperly considered, since a man has no duty to support a woman who is not (or at least who never was [38]) his wife, whether or not he thinks she is. But in both cases the supposed husband was correctly held liable to the merchant because from cohabitation and other circumstances there was apparent authority of the woman to bind him as his agent. It has even been held in an early English case [39] that a man who voluntarily cohabits with a woman not his wife is liable for her purchases of necessaries from a merchant who knew that she was not his wife; but the soundness of this decision is very doubtful. If the defendant is to be held at all, it must be on principles of agency, and in that case, the question whether or not the purchases were necessaries, is wholly immaterial.

What Constitute Necessaries?

Assuming that the liability of the husband to support has become fixed and that he cannot be held under any agency theory, the problem of the definition of necessaries becomes important, for the obligation of support is merely to furnish necessaries to the wife. More than that she cannot demand.

The term obviously includes food, clothing, and shelter required by the wife; but it is much broader than this. It also includes medical and dental services,[40] and it has been held to include furniture under certain circumstances.[41] On the other hand, a set of "Stoddard's Lectures" has been held not to be a necessary,[42] though it would hardly follow from this that all books are luxuries in this sense.

---

[38] It is, of course, common to award alimony to a divorced wife and thus really compel her former husband to support her.

[39] Watson v. Threlkeld, 2 Esp. 637 (1798).

[40] Simpson v. Drake, 150 Tenn. 84, 262 S. W. 41 (1924); Clark v. Tenneson, 146 Wis. 65, 130 N. W. 895 (1911).

[41] Jordan Marsh v. Cohen, 242 Mass. 245, 136 N. E. 350 (1922). See Mickelberry v. Harvey, *supra* note 18.

[42] Shuman v. Steinel, 129 Wis. 422, 109 N. W. 74 (1906).

The tendency seems to be to widen the scope of this classification of necessaries. Many articles which are commonly regarded as luxuries, and are certainly more ornamental than useful, are coming to be regarded as things for which the husband must pay, even against his own wishes. Thus it has been held improper to rule that a locket and chain and a watch, all of gold, were not necessaries;[43] though this has been disputed.[44] It has even been held in Massachusetts that a fur coat is a necessary.[45] Despite the rigorous climate of the Bay State one is tempted to feel that this case goes a trifle too far; but the actual decision is correct, since the parties, though not validly married, were cohabiting under such circumstances as gave the putative wife apparent authority to bind the man as his agent; and the purchase was not extravagant in view of the circumstances of the supposed husband.[46]

The truth seems to be that the financial circumstances of the family if the spouses are living together, and to a lesser extent of the husband if they are separated, are given a certain weight in this matter. This tendency does not go so far as to destroy any distinction between necessaries and family expenses under the statutes imposing a liability on both spouses for such expenses.[47] A necessary is something needed rather than merely desired by the wife; but what she needs is dependent to some extent upon what she has become accustomed to, and what her husband may reasonably be expected to supply.[48] In close cases the problem is really one of fact and is to be left to the jury.[49]

Apart from these general considerations there are two specific problems with regard to the definition of necessaries which deserve notice. One of these is as to whether expenses of the wife in connection with litigation are necessaries. If the litigation

[43] Raynes v. Bennett, 114 Mass. 424 (1874).

[44] Johnson v. Briscoe, *supra* note 20.

[45] Jordan Marsh v. Hedtler, *supra* note 37.

[46] See discussion of this case, *supra* pp. 829, 830.

[47] See MADDEN, DOMESTIC RELATIONS (1931) 200, for a discussion of these statutes.

[48] Simpson Garment Co. v. Schultz, 182 Wis. 506, 194 N. W. 783 (1924) where it was held error to charge that necessaries must be "suitable to the manner of life which the husband authorizes or permits."

[49] 13 R. C. L. 1208.

is not with the husband—for example, if they are incurred to defend the wife from a criminal prosecution—there would seem to be no doubt that such expenses are for necessaries.[50] The same would seem to apply where the wife is making a criminal charge against the husband, though it has been held that where the wife could make the charge personally, she cannot compel the husband to pay a lawyer employed by her to do so.[51]

The principal dispute is as to attorney's fees and similar expenses incurred in divorce and separation proceedings brought by the wife against the husband. It seems clear that the husband should never be charged unless the action was brought in good faith and with at least reasonable grounds.[52] But even with this limitation, the prevailing view in this country is that such expenses are not necessaries with which the husband can be charged.[53] The rule is different in England,[54] and there is some American authority following the English view.[55] Where the husband is held liable for the legal services furnished to the wife in such a suit, he should also be obliged to pay her other needful expenses as for detectives, etc.[56] There is some dispute as to whether a husband must pay for legal advice which the wife considered necessary for her own protection against him;[57] but it is submitted that he should be held liable for this, since whatever her legal rights, she cannot reasonably be expected to act on them without legal advice. But where the wife is entitled to counsel fees in a divorce suit, there is certainly less necessity that the hus-

[50] Elder v. Rosenwasser, 238 N. Y. 427, 144 N. E. 669 (1924).

[51] Conant v. Burnham, 133 Mass. 503 (1882).

[52] 13 R. C. L. 1211 ff.

[53] Meaher v. Mitchell, 112 Me. 416, 92 Atl. 492 (1914); Shelton v. Pendleton, 18 Conn. 423 (1847).

[54] See Wilson v. Ford, 3 Exch. 63 (1868).

[55] 13 R. C. L. 1211 ff. See Mayper v. Harlan, 125 Misc. 123, 210 N. Y. S. 257 (1923).

[56] Lanyon's Detective Agency v. Cochrane, 240 N. Y. 274, 148 N. E. 520 (1925) holds that detectives employed by the wife cannot recover from the husband for their services; but only because the court found such services unnecessary in the particular case.

[57] That the attorney cannot collect from the husband on the ground that his services are not really necessary, see Conant v. Burnham, *supra* note 51, and Meaher v. Mitchell, *supra* note 53. That such fees can be collected from the husband, see Wilson v. Ford, *supra* note 54. The English view seems preferable.

band should be liable to suit by the attorneys under this principle.[58]

The other specific problem is whether funeral expenses of the wife are chargeable to the husband as necessaries. Normally, the duty of support exists only during the lives of both spouses. But funeral expenses are so closely connected with the welfare of the decedent and his family that they may reasonably be regarded as a necessity. The weight of authority, therefore, requires the husband to pay for the funeral expenses of the wife.[59] Where an opposite result is reached, or where the liability of the husband is regarded as secondary to that of the wife's estate, the decision is usually dependent on some statute of the jurisdiction.[60]

So far we have considered only what articles may be considered as necessaries. We must still inquire whether such an article is necessary to this particular wife at this particular time. And here we are met with the rule that nothing can be a necessary if the wife is adequately supplied with that article.[61] If she has enough, more is not necessary, and this no matter how elementary and important is the need supplied by the particular article.

If, then, the husband supplies the wife with what she needs or with sufficient money to buy it, he is not liable for further purchases which she makes.[62] In England it has even been held that if the husband furnishes the wife with any money at all, he is not liable for her purchases of necessary articles, although the amount furnished her was clearly insufficient for her support;[63] but this case is clearly wrong. It is proper to absolve the husband from the duty of supporting his wife more than once; but he should not be excused when he only half does it.

---

[58] Meaher v. Mitchell, *supra* note 53.

[59] Simpson v. Drake, *supra* note 40; Barnes v. Starr, 144 Md. 218, 124 Atl. 922 (1923).

[60] In re Skillman's Estate, 146 Ia. 601, 125 N. W. 343 (1910). The very cryptic opinion to the same effect in Constantinides v. Walsh, 146 Mass. 281, 15 N. E. 631 (1888) is not easily understandable, but apparently depends, at least in part, upon a state statute.

[61] This principle seems to have been disregarded in Mizen v. Pick, 3 M. & W. 481 (1838). But it is supported by overwhelming authority. Debenham v. Mellon, *supra* note 8; Mickelberry v. Harvey, *supra* note 18; Dolan v. Brooks, 168 Mass. 350, 47 N. E. 408 (1897).

[62] Wanamaker v. Weaver, 176 N. Y. 75, 68 N. E. 135 (1903).

[63] Jolly v. Rees, *supra* note 6.

A few authorities seem to make the opposite mistake; they hold the husband for necessaries furnished to the wife although he has given her sufficient money to pay for these things—which money she has spent for other things.[64] It is believed that this anomalous result is due to the failure of the courts to make the distinction so much insisted on here—that between support and true agency. If it is the latter, the merchant or other person furnishing the articles in question to the wife is entitled to rely upon her apparent authority to bind the husband as his agent and is not bound to take notice of any dealings between the spouses; but if the obligation can arise only under the narrower category of the duty of support, the outsider must decide at his peril not only whether the article furnished is capable of being considered a necessary under any circumstances, but also whether it is a necessary to this particular woman; and it is not, if her husband has supplied her with it or with the means of getting it. It is obvious, however, that the fact that he has furnished a sufficient supply of some other necessary does not affect his liability on the purchase in question if that was also of a necessary.[65]

An allied but quite separate question is whether a wife who has sufficient resources to support herself is nevertheless entitled to support from her husband. It is obvious that she does not need to be supported, but the question still remains whether the husband should be absolved from his duty by the purely fortuitous circumstance that his wife has independent resources. Nevertheless, on the same theory that nothing can be a necessary to a person who has the ability to obtain such articles as are needed, some courts hold that such a wife is not entitled to support.[66] But the better view seems to be to the contrary; the husband should not be freed from his obligation to support his wife merely because she can, with more or less trouble, support herself.[67] This is especially true because the primary purpose of the former equitable doctrines and the modern statutes for

[64] Hall v. Fletcher, 99 Vt. 199, 130 Atl. 685 (1925); Ruddock v. Marsh, 1 H. & N. 601 (1857); Vaughan v. Mansfield, *supra* note 24.

[65] Simpson Garment Co. v. Schultz, *supra* note 48.

[66] Hunt v. Hayes, 64 Vt. 89, 23 Atl. 920 (1891); Litson v. Brown, 26 Ind. 489 (1866). See Dolan v. Brooks, *supra* note 61.

[67] 1 WILLISTON, SALES, 80-81.

insuring the right of separate property to married women was to free them from the control of their husbands and not to free the latter from their own obligations.[68] There is good authority for the view here advocated.[69]

Excuses or Justification for Failure to Support

We must now consider the defenses which the husband may make to a claim that he is not properly supporting his wife. Of these one of the most frequent and certainly the most obvious is that he is paying to her the amount prescribed by a court as alimony or the amount agreed upon between them when they separated.

If the husband is paying alimony, it would seem clear that he is not bound to do anything further toward the support of his spouse or former spouse. A detailed consideration of alimony is beyond the scope of this paper, but it is elementary that it is awarded for the support of the wife.[70] In fact, it goes much beyond this, not only because the amount awarded is often far beyond the most princely ideas of what can constitute support, but also because it is commonly awarded in divorce proceedings, where the one-time wife becomes a wife no longer, but still gets her alimony. But all this makes it the more evident that any man who pays alimony is certainly doing his fnll duty with respect to the support of his wife or former wife, and is liable for no more.[71] But the mere fact that no alimony has been awarded against him, even though his wife has attempted to obtain it, does not prove that he is not liable to support her.[72] And it has sometimes been held that the payment of alimony *pendente lite* does not bar a claim for support, as such alimony is considered as merely paying the expenses of the litigation.[73]

[68] Methodist Episcopal Church v. Jaques, 1 Johns. Ch. 449 (N. Y. 1815). But see the same case in 17 Johns. Ch. 548 (N. Y. 1820).

[69] American Mill Co. v. Industrial Board, 279 Ill. 560, 117 N. E. 147 (1917); Ott v. Hentall, 70 N. H. 231, 47 Atl. 80 (1900); Poole v. People, *supra* note 36.

[70] Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735 (1901).

[71] McFerren v. Goldsmith, *supra* note 20.

[72] Elder v. Rosenwasser, *supra* note 50. The decision of the lower court (121 Misc. 181, 200 N. Y. Supp. 620) was reversed on this very ground.

[73] Barnes v. Starr, *supra* note 59; Wolf & Co. v. Mapson, 146 Minn. 174, 178 N. W. 318 (1920).

As for payments to the wife in accordance with separation agreements, the protection of the husband is not so complete. In the first place, there is the question as to the validity of the agreement because it is between husband and wife;[74] but normally such agreements are upheld at least in so far as they provide for the support of the wife.[75] In England, the agreement is held binding in all respects, so that a husband who pays the amount specified therein is subject to no further liability, even though the amount which he pays is concededly quite insufficient for the support of the wife.[76] It would seem that an opposite result would be reached in this country, as the wife could put an end to the binding effect of the agreement by requesting her husband to take her back.

But even though the wife is willing to accept the status created by the agreement and does not desire to resume cohabitation with her husband, the provisions with respect to her support are, as against her, not regarded as very rigidly binding. Thus, a provision in such an agreement by which the wife wholly gives up her right to support is void as contrary to public policy.[77] And in case of any suspicion of unfair advantage taken of the wife or even of misunderstanding by her for which no one else is to blame, the agreement may be set aside and the husband will then have the same liability to support her as if no such agreement had ever been entered into.[78]

Another excuse which is often tendered by husbands who are charged with delinquency in the performance of this duty, is their own inability. Most of the adjudications with respect to this matter are in criminal proceedings; but the excuse, if properly verified, is obviously a good one in any sort of case. Our experiences of recent years have reminded us very emphatically that the man who fails to support his family is very often in no way to blame. In general, then, the husband must do the best

[74] Jordan Marsh v. Cohen, *supra* note 41, holding the separation agreement invalid because between husband and wife.

[75] MADDEN, DOMESTIC RELATIONS, (1931) 331; Shaw v. Shaw, 122 S. C. 386, 115 S. E. 322 (1923).

[76] Eastland v. Burchell, L. R. 3 Q. B. D. 432 (1878).

[77] Lyons v. Schanbacher, 316 Ill. 569, 147 N. E. 440 (1925).

[78] Hamlin v. Hamlin, 129 Misc. 251, 221 N. Y. S. 247 (1927); Boehm v. Boehm, 88 N. J. Eq. 74, 101 Atl. 423 (1917).

he can under the circumstances, but that is all that he can be held for.[79]

It would seem, however, that he should not be excused merely because he has no property. His earning power should likewise be considered,[80] and it seems that the court may properly require him to work, if work is available; but there is some dispute on this last point.[81] Of course, his inability to work will not excuse him if he has property and credit.[82] It is suggested in some cases that previous unfair conduct of the husband, such as giving away his property to his children, should result in holding him liable for failure to support his wife though he is now unable to do so;[83] but this seems unduly harsh, especially where a criminal prosecution is involved. In this matter also, the validity of the husband's excuse for non-support, because of his claimed inability so to do, is usually a question of fact for the jury.[84]

More frequently still, the husband advances as justification for his failure to support his wife, her own misconduct. There is no doubt that certain misconduct of the wife does forfeit any claim for support, so that this matter must be considered in some detail.

The most obvious action which will forfeit the wife's right to support is adultery. Even this is no excuse to the husband if committed with his consent;[85] and it is immaterial that he gave such consent on condition that he should no longer be liable to support her, as such an agreement is illegal.[86] But normally the adultery of the wife excuses the husband from further supporting her.[87] It seems that the excuse applies whether the spouses are cohabiting or separated at the time of the offense;[88] and it has even been held, though perhaps with undue harshness, that though the husband unjustifiably drove the wife away, yet her

[79] State v. McPherson, *supra* note 2; State v. Kelly, *supra* note 2.

[80] Kemp v. Kemp, 144 La. 671, 81 So. 221 (1918-9).

[81] Wohlfort v. Wohlfort, 116 Kans. 154, 225 Pac. 746 (1924); State v. Witham, 70 Wis. 473, 35 N. W. 934 (1888).

[82] State v. Hill, *supra* note 2.

[83] Kemp v. Kemp, *supra* note 80.

[84] State v. Newman, 91 Conn. 6, 98 Atl. 346 (1916).

[85] Wilson v. Glossop, 19 Q. B. D. 379 (1887).

[86] Ferren v. Moore, 59 N. H. 106 (1879).

[87] Cooper v. Lloyd, 6 C. B. N. S. 518 (1859), substantially overruling Norton v. Fazan, 1 Bos. & P. 873 (1798); State v. Lancaster, *supra* note 2.

[88] Houliston v. Smyth, *supra* note 6; Cooper v. Lloyd, *supra* note 87.

subsequent adultery excused him from supporting her, since she could at any time have compelled him to support her.[89] At any rate, it may be generally stated that the wife's adultery forfeits her claim for support unless her husband's blame for the misconduct can be very clearly established.

A less serious form of misconduct, but one which just as clearly forfeits the wife's right to support, is desertion of the husband. There is no question that a wife who is without justification living apart from her husband is not entitled to support.[90] Here, too, the husband is not subjected to liability to one who furnishes necessaries to the wife by the fact that this outside party did not know about the separation or that the wife was at fault.[91] But if the wife offers in good faith to return to the husband, her right to be supported at once revests.[92]

The question remains as to what circumstances will justify the wife in leaving the husband, so that she will not forfeit her right to support by so doing. It seems clear that harsh and abusive treatment, even though possibly falling short of technical cruelty will have this effect.[93] Nor will the wife's condonation of the husband's misconduct relieve him from liability to merchants who have furnished necessaries to the wife before she resumed cohabitation with him.[94]

If the wife is turned out of the house by the husband, though without cruelty, or even if she departs voluntarily, but he is obviously complaisant,[95] the same result follows—he is still liable to support her. And it appears that she will be justified in leaving if she is compelled to live with relatives of the husband who are unkind to her, even though this is only mental cruelty and is not participated in by the husband except by such insistence.[96]

[89] Ellett v. Ellett, 157 N. C. 161, 72 S. E. 861 (1911).

[90] Steinfield v. Girrard, 103 Me. 151, 68 Atl. 630 (1907); Vusler v. Cox, 53 N. J. L. 519, 22 Atl. 347 (1891); Benjamin v. Dockham, 132 Mass. 181 (1882).

[91] Vusler v. Cox, *supra* note 90.

[92] M'Cutchen v. M'Gahay, 11 Johns. 281 (N. Y. 1814). *Cf.* Manby v. Scott, 1 Mod. 781 (1659).

[93] Mayhew v. Thayer, 8 Gray (Mass.) 172 (1857).

[94] Reynolds v. Sweetser, 15 Gray (Mass.) 78 (1860).

[95] Barefoot v. Barefoot, 83 N. J. Eq. 685, 93 Atl. 192 (1914); Biddle v. Frazier, 3 Houst. 258 (Del. 1864).

[96] Spafford v. Spafford, 199 Ala. 300, 74 So. 354 (1917); Brewer v.

In fact, it seems that in this matter of justification for leaving home, the presumption is in favor of the wife. If the fault seems to be somewhat evenly divided [97]—at least, if the preponderance of fault is not clearly with the wife—she is still entitled to support. There is, of course, no requirement that the misconduct of the husband be sufficient to give grounds for divorce, whether in the state of matrimonial domicile or any other.[98]

Adultery and desertion, which have been considered, are the chief categories of misconduct which forfeit the claim of a wife to support from her husband. It has been suggested that neglect of household duties by the wife should have the same effect.[99] Whatever may be the abstract justice of this theory, it is obvious that it is unworkable (who shall decide whether the house is properly kept?), and it seems clear that so long as the wife does not leave home, her slackness in housekeeping, no matter how bad, does not absolve her husband from supporting her.[100]

When the wife buys necessaries under such circumstances that her husband is bound to pay for them under the terms of the duty to support her, he frequently makes still another excuse in endeavoring to avoid payment. This is that the credit has been extended to the wife, and accordingly he is not himself liable. It seems clear that if the merchant deliberately decides to hold the wife, he cannot also hold the husband.[101] This seems to be a somewhat anomalous rule, and rests frequently, if not always,

---

Brewer, 79 Neb. 726, 113 N. W. 161 (1907). See Broun v. Durepo, *supra* note 7.

[97] Rearden v. Rearden, 210 Ala. 129, 97 So. 138 (1923).

[98] State v. Newman, *supra* note 84; Shipley v. Shipley, 187 Iowa 1295, 175 N. W. 51 (1919). In Pearson v. Pearson, 230 N. Y. 141, 129 N. E. 349 (1920) it was held that the wife was justified in leaving the husband on account of his harsh treatment of her, although cruelty is not a ground for divorce in New York.

[99] Lee v. Savannah Guano Co., 99 Ga. 572, 27 S. E. 159 (1896) where the court said: "The husband is not bound to support his wife in luxurious idleness. If she refuses to perform her obligations, she forfeits all right to demand of him a support."

[100] State v. Kelly, *supra* note 2. The husband does not by setting up his inability to support the wife estop himself from showing that she is, through her own misconduct, not entitled to support. Audrain County v. Muir, 297 Mo. 499, 249 S. W. 383 (1923).

[101] Moore v. Flanagan, (1920) 1 K. B. 919; Morel Bros. v. Earl of Westmoreland, (1904) A. C. 11; Jones v. Gutman, *supra* note 6.

upon the same judicial confusion between true agency and support, which has already been frequently noticed.[102] It must be confessed that there is a certain justification for this doctrine under modern statutes removing the disabilities of married women; but the doctrine has been applied where such statutes are not in force.[103] If the merchant charges the wife in preference to the husband, it seems not unfair to release the latter;[104] but in fact the scope of this doctrine is very much broader.

The better view is that the entries on the merchant's books are not conclusive on this matter;[105] that even though he has charged the wife on his books, he may nevertheless show that he intended to hold the husband also.[106] It should not be forgotten that while the wife may be liable, yet her liability should be secondary to the primary one of her husband to support her, and he should not readily be excused.[107] In general, however, proof that credit was extended to the wife results in the exemption from liability of the husband; the only practical limitations of this rule being that there is usually a presumption against credit being given to the wife, and that mere entries on the books of the merchant are, by the weight of authority, not conclusive in this matter.[108]

We must still consider whether if the wife is charged, she must herself pay. Obviously not, at common law.[109] And it has been held that she is not liable where the merchant charged her without knowing that she was married;[110] the theory of the court being that she is not liable because she acted as an authorized agent, and this nowithstanding the fact that she did not disclose her principal. Even regarding this as a pure question of

[102] Wickstrom v. Peck, 179 App. Div. 855, 167 N. Y. Supp. 408 (1917). See comment on this case in 18 Colum. L. Rev. 368.

[103] Gafford v. Dunham, 111 Ala. 551, 20 So. 346 (1896).

[104] Carter v. Howard, 39 Vt. 106 (1866). See Dolan v. Brooks, *supra* note 61.

[105] Beaudette v. Martin, 113 Me. 310, 93 Atl. 758 (1915).

[106] Noel v. O'Neill, 128 Md. 202, 97 Atl. 513 (1916).

[107] Edminston v. Smith, 13 Ida. 645, 92 Pac. 842 (1907); Clark v. Tenneson, *supra* note 40.

[108] See 27 A. L. R. 544.

[109] Smout v. Ibery, *supra* note 13.

[110] Metler v. Snow, 90 Conn. 690, 98 Atl. 322 (1916); Paquin v. Beauclerk, (1906) A. C. 148. The latter case is purely one of agency, since the husband had furnished the wife sufficient funds for her personal and family expenses.

agency, such decisions seem unsound, as the agent of an undisclosed principal is generally personally liable.[111] But it does seem entirely proper to hold, as is generally done,[112] that the presumption is against the married woman being personally liable. She cannot be held unless it is fairly clear that she intended to bind herself,[113] but even the husband's consent to the purchase will not necessarily absolve her from liability, if in fact she voluntarily undertook a personal obligation.[114] Even though the article purchased is a necessary, the wife may bind herself to pay for it;[115] though it takes a strong case for this, because of the contrary presumption just stated.

One other defense is sometimes set up by a husband who feels that it is unfair that he should be required to support his wife. Where the wife has in fact been supported by her own near relative (often her father), the erring husband may claim that he is not bound to reimburse such relative. The theory is that the relative intends to make a gift to the wife rather than to furnish her support at the ultimate expense of her husband; and there is a presumption (but a rather weak one) this way.[116] The presumption is, however, very readily rebutted, and it has been held that this is sufficiently accomplished by the opposite and stronger presumption that the husband is liable to support his wife.[117] It has also been held (though this decision seems rather doubtful in principle) that a husband is liable to the father of his wife for necessaries furnished by the father to her, although the husband had furnished the wife with abundant money—which money she had spent for other purposes.[118] It seems clear that on the whole the husband gets little comfort from this attempted defense.

---

[111] MECHEM, AGENCY (2nd ed., 1914) § 1410.

[112] Grandy v. Hadcock, *supra* note 1; Noel v. O'Neill, *supra* note 106.

[113] Feiner v. Boynton, 73 N. J. L. 136, 62 Atl. 420 (1905); Brown v. Durepo, *supra* note 7.

[114] Weisker v. Lowenthal, 31 Md. 413 (1869). *Cf.* Stammers v. Macomb, 2 Wend. (N. Y.) 454 (1829).

[115] Lea Gas Co. v. Malvern, (1917) 1 K. B. 803. But *cf.* Paquin v. Beauclerk, *supra* note 110.

[116] Mihalcoe v. Holub, 130 Va. 425, 107 S. E. 704 (1921); Biddle v. Frazier, *supra* note 95.

[117] Fisher v. Drew, *supra* note 21.

[118] Hall v. Fletcher, *supra* note 64. See p. 834 *supra*, for discussion of this case.

The main advantage which the wife obtains from this duty of the husband to support her is, of course, protection from destitution. But occasionally, less obvious but no less real advantages appear. A wife who has joined with her husband in a parol agreement to convey land to a third person in consideration of his supporting them, may refuse to convey without any quasi-contractual liability for support already furnished; for she has received nothing to which she was not already entitled.[119] The husband who spends his money to purchase a home taken in the name of his wife gets no resulting trust in his own favor, for he has only been performing his duty to support her.[120] For the same reason, a man who agreed to take care of his blind wife in consideration of her leaving him a bequest, cannot collect from her estate when she dies without complying with her promise.[121]

As has been seen, and as might be expected, the husband generally gets no advantage as against his wife through his supporting her; he is only doing what he is bound to do anyway. However, surprising as it may seem, the husband sometimes does profit by reason of the existence of this ordinarily burdensome duty. Thus it has been held that where the spouses had separated amicably, and the wife was in fact supporting herself, the husband, being still bound to support her, was the "head of a family," and entitled to a homestead exemption as such.[122] And where the spouses had entered into a separation agreement, under the terms of which each gave up all claim to the property of the other and the wife gave up all claim to be supported by the husband, it was held that the latter agreement was illegal and vitiated the remainder of the separation agreement; and accordingly, the husband could claim his share of the wife's estate, in disregard of his agreement not to do so.[123] The soundness of this decision may be questioned, since it seems to involve the husband's getting an advantage against the wife through his own failure to perform his legal duty to support her. But it is clear

[119] Lavoie v. Dube, 229 Mass. 87, 118 N. E. 179 (1918).
[120] Fry v. National Sav. & T. Co., 289 Fed. 589 (D. C., 1923).
[121] In re Ryan's Estate, 134 Wis. 431, 114 N. W. 820 (1908).
[122] Appeal of Brookland Bank, 112 S. C. 400, 100 S. E. 156 (1919).
[123] Lyons v. Schanbacher, *supra* note 77. See also Van Koten v. Van Koten, 323 Ill. 323, 154 N. E. 146 (1926).

that the existence of this duty occasionally properly results in an advantage to the husband.

Methods of Enforcing the Duty of Support

Only one major problem, but that one of immense importance, remains for consideration. That is the problem how this duty of the husband is to be enforced. Like all other legal rights, its actual value depends very largely upon the effectiveness of the means which are afforded by the courts for enforcing it.

The conception of the common law judges was that the duty was to be enforced through the merchants or other outside parties who have furnished the wife with necessaries. That is, the wife is to purchase the articles required, and the tradesman is then to collect for them from the husband. Under this conception, the wife has no direct rights against her husband; she can act only through some person who is willing to furnish her with necessaries and take the chance of collecting against her husband.

A few jurisdictions still insist on this view.[124] The wife can, of course, proceed against her husband for divorce or judicial separation, and as an incident thereto obtain a decree for alimony. This amounts to a direct proceeding between the spouses for the support of the wife; but such jurisdictions insist that alimony decrees are proper only in suits for divorce or separation,[125] and this although the wife is unwilling, for conscientious scruples or otherwise, to bring such a proceeding.[126] It must be remembered also, that a wife may be entitled to support from a husband against whom she has no legal grounds for divorce.[127] Unless the rule in these jurisdictions is changed by statute, a wife in any one of them has in many instances no direct right against her husband for support.

The question remains whether this method of enforcing the liability through tradesmen is reasonably effective. This obvi-

---

[124] The leading authority on this point is Ball v. Montgomery, 2 Ves. Jr. 191, 195 (1793). See also Rariden v. Rariden, 33 Ind. App. 284, 70 N. E. 398 (1904); Shannon v. Shannon, 2 Gray (Mass.) 285 (1854); Trotter v. Trotter, *supra* note 31.

[125] Ross v. Ross, 69 Ill. 569 (1873).

[126] Adams v. Adams, 100 Mass. 365 (1868).

[127] See p. 839 *supra*.

ously depends upon the willingness of the tradesmen to supply goods and services under such conditions. And it is fairly obvious that the circumstances are not particularly encouraging from their point of view.

In the first place, the tradesman is buying a law-suit, for the husband is almost certain to refuse to pay until compelled to. Worse yet, the chances in the suit are all in favor of the recalcitrant husband and against the complaisant merchant. The latter takes all the risk, and has the burden of showing not only that the husband was apparently liable, but (if it is really a case of support and not of agency) that he is actually liable.[128] He must show whether or not the wife is living apart from the husband, and if she is, that she is in fact justified.[129] And he must show that the wife has not been otherwise supplied with the kind of necessaries which she has obtained from him.[130]

With this heavy burden which is cast upon the tradesman to litigate, and to prove in this litigation numerous facts as to which he cannot possibly have any actual knowledge at the time the wife applies to him, it can hardly be surprising that the tradesman more usually than not declines to supply the wife who applies under such circumstances. It has been suggested that the well-known eagerness of merchants to sell may be depended on to induce them to take a chance, and so supply the wife.[131] This may be true when the spouses are cohabiting, and the merchant has therefore a good chance of holding the husband under agency principles. At all events, he knows that there is heavy social, if not legal, pressure, which is likely to induce the husband to pay. But when the spouses are not cohabiting, the merchant feels quite otherwise, especially as he realizes that even when he has obtained a judgment against the husband, it will probably not be collectible. Under these circumstances, the wife is quite insufficiently protected unless she has some direct right against her delinquent spouse.

---

[128] Freestone v. Butcher, *supra* note 14; Rea v. Durkee, *supra* note 23; Clothier v. Sigle, 73 N. J. L. 419, 63 Atl. 865 (1906).

[129] Rea v. Durkee, *supra* note 23.

[130] See p. 834 *supra*. He also takes a certain risk that he may be found to have waived his rights against the husband by having charged the wife. See pp. 839, 840 *supra*.

[131] Wanamaker v. Weaver, *supra* note 62.

A much more satisfactory method of enforcing this duty is through the criminal statutes. These are now practically universal, and, as already shown,[132] they are generally so drawn as to put effective pressure on the husband to perform his duty of support. Such statutes therefore furnish an effective recourse to the wife of a lazy or shiftless husband. They are, however, less reliable in persuading a recalcitrant husband to perform his duty of support. For this purpose, a direct civil action is better.

A method of procedure which is somewhat more efficacious than the indirect action through the merchants and yet is not subject to the theoretical objections which some courts find to a direct action by the wife against the husband to compel him to support her, is an action to recover for past support on the basis of subrogation. Here the money is furnished by some relative or friend of the wife, and thus by one who, because of his personal interest in her welfare, is more likely than a merchant to be willing to advance the money and take the risk of recovery against the husband. This is obviously a considerably better method of enforcing the duty of support, providing the kindly-disposed relative or friend is permitted by the courts to reimburse himself at the husband's expense. As already stated, the basis on which such a suit for reimbursement is sustained is on the analogy of subrogation. One or two courts refuse to permit such a suit because there is no debt owed to the merchant, to which the person furnishing the money to the wife can be subrogated;[133] but the weight of authority disregards this technicality and permits such an action.[134]

A still further development of this principle is the suggestion that the wife should be able to sue the husband for reimbursement of what she has necessarily spent upon her own support. It seems entirely clear that a wife cannot sue her husband to recover damages because of his failure to support her.[135] The rea-

[132] See pp. 823, 824, *supra*.

[133] Skinner v. Tirrell, 159 Mass. 474, 34 N. E. 692 (1893). See for a defense of this case 1 WILLISTON, SALES, 82. But *cf.* Hanover v. Turner, 14 Mass. 227 (1817).

[134] Kenyon v. Farris, 47 Conn. 510 (1880); Leuppie v. Osborn, *supra* note 31.

[135] Decker v. Kedly, 148 Fed. 681 (C. C. A. 9th Circ., 1906); Gowin v. Gowin, 264 S. W. 529 (Tex. Civ. App., 1924).

sons given for this rule in the cases laying it down are not very illuminating. But the obvious reason is that no damages can ever be proved to have been incurred, and if any could be proved, they could not be measured in money. But no such objection confronts an action by the wife for reimbursement of amounts expended in her own support; and such actions have several times been allowed.[136]

In one American case, a wife who was in actual destitution was held to have the power to sell a stove belonging to her husband (who was then in prison) in order to raise sufficient money to buy food and other elementary necessities.[137] This would seem to be a further application of the subrogation or reimbursement theory just discussed; but the case seems to stand alone. Such direct action does not seem to be encouraged by the courts even in this very good cause.

Last but not least comes the most radical form of proceeding for enforcing the performance of this duty by the husband—the direct action by the wife to have support decreed to her. The effect is of an action for alimony, but without seeking a divorce or judicial separation. This is a much more radical remedy than a mere suit for reimbursement such as has already been discussed, for here the decree is for future support for an indefinite period, rather than merely to compel repayment for past expenditures.

It will readily be seen that such a suit would not even have been thought of in the Blackstonian days of the common law. And even now, it is not wholly clear that it should be encouraged. The wife who is unwilling to bring an action for divorce or judicial separation might well be considered to be adequately protected—or at least adequately enough—by a combination of the criminal statutes and actions for reimbursement. But despite these possible theoretical objections, the enormous weight of American authority permits such actions[138]—though this result has often been reached with the aid of statutes.[139] The theory

[136] Sodowsky v. Sodowsky, 51 Okla. 689, 152 Pac. 390 (1915); De Brauwere v. De Brauwere, 203 N. Y. 460, 96 N. E. 722 (1911). The latter case cites Decker v. Kedly, *supra* note 135, as in opposition to this view; but there is no real conflict.

[137] Ahern v. Easterby, 42 Conn. 546 (1875).

[138] Ann. Cas. 1913 D, p. 1132.

[139] 1 R. C. L. 878 ff.

of the courts has been that this is the only thoroughly adequate method of enforcing the duty of support and that it would be neither fair nor in accordance with wise public policy to drive the wife to a divorce action in order to enable her to take advantage of it.

The California case of *Galland* v. *Galland* [140] is generally considered as the leading American authority on this point. However, it was long preceded by a decision in South Carolina which, in a vigorous and well-reasoned opinion, allowed such an action.[141] The modern cases on the point are almost innumerable.[142] It is held that this action is sufficiently analagous to divorce proceedings so that temporary as well as permanent alimony can be given without explicit statutory authorization.[143] But since it is really not a divorce suit, cruelty or other misconduct of the husband need not be pleaded or proved except to the extent necessary to justify the wife in living apart from the husband.[144]

This action for support sometimes involves interesting questions of jurisdiction and venue. It is a purely personal action and is in no sense an action *in rem,* as is a divorce action. The requirements as to domicile of the parties which may be made by statute are therefore not jurisdictional, as in the case of divorce actions, but relate only to venue, and so may be waived.[145] But the action is not even subject to the venue restrictions of divorce suits.[146] It is transitory, and so may be maintained by a non-resident, although a non-resident is not permitted to bring a divorce suit.[147]

---

[140] 38 Calif. 265 (1869).

[141] Prather v. Prather, 4 Desaus. 33 (S. C. 1809). See also Garland v. Garland, 50 Miss. 694 (1874).

[142] Typical examples are Sellers v. Sellers, 208 Ala. 44, 93 So. 824 (1922); Simonton v. Simonton, 33 Ida. 255, 193 Pac. 386 (1920); Clifton v. Clifton, 83 W. Va. 149, 83 S. E. 72 (1919); Wohlfort v. Wohlfort, *supra* note 81; Hagert v. Hagert, 22 N. D. 290, 133 N. W. 1035 (1911).

[143] Robertson v. Robertson, 138 Minn. 290, 164 N. W. 980 (1917); State *ex rel.* Young v. Superior Court, 85 Wash. 72, 147 Pac. 436 (1915). But see London v. London, 211 Ky. 271, 277 S. W. 287 (1925).

[144] Tutwiler v. Tutwiler, 205 Ala. 283, 87 So. 852 (1921).

[145] George v. George, 190 Ky. 706, 228 S. W. 408 (1921); Hilton v. Second District Court, 43 Nev. 126, 183 Pac. 317 (1919).

[146] Lang v. Lang, 70 W. Va. 205, 73 S. E. 716 (1912).

[147] Hiner v. Hiner, 153 Cal. 254, 94 Pac. 1044 (1908). The court said that while divorce suits are to be restricted, suits for support are to be encouraged.

If the husband, rather than the wife, is a non-resident but has property in the state, the suit may be brought by attaching the property, according to the familiar category of suits *quasi in rem*.[148] It has even been held that a state court may decree support to a resident wife against non-resident defendant-husband who had no property in the state, on the ground that a divorce suit could be brought in such circumstances, and a suit for support is analagous to one for divorce.[149] The court conceded that it was doubtful whether other states would or could be compelled to give effect to this decree, and so that it could probably not be enforced unless the defendant could be caught in the state where it was rendered. This is, of course, a practical admission of the unsoundness of the case; for if the decree were valid it would have to be given effect to in other states under the "full faith and credit" clause of the Federal Constitution.[150] The decision is unsound because of its failure to recognize that this action for support, whatever may be its analogies to divorce actions, is still nothing more than a personal action, and cannot be sustained on any other basis.[151]

Conclusion

It will appear from the foregoing that the authorities on this subject are in considerable confusion. The actual difficulties are believed, however, to be rather more apparent than real, and the great majority of the cases seem to reach a desirable result. Such difficulties as still occasionally appear in the substantive law of this subject are generally due to the failure of the courts to distinguish between agency in its proper sense, and support. When it is recognized that the obligation of support is imposed upon the husband by law and without regard to his consent, a satisfactory solution of any particular problem is at least easier and more likely to be obtained than by confusing the subject by a discussion of the inapplicable principles of agency. Particularly

[148] Shipley v. Shipley, *supra* note 98.

[149] Blackinton v. Blackinton, 141 Mass. 432, 5 N. E. 830 (1886).

[150] Art. IV, Sec. 1.

[151] Bliss v. Bliss, 50 Fed. (2d) 1002 (D. C., 1931). The husband had property in the District of Columbia, but as the District had no statutory provisions for bringing a personal suit by attachment, the wife was without remedy.

in the confused question of what will excuse the husband from supporting the wife, it is important to remember that this is a duty imposed by law and therefore the husband should not be permitted to absolve himself of the duty by any voluntary action of his own. In fact it would seem better to hold that only the action or consent of the wife should excuse the husband. On the other hand, it would seem that a recognition of the involuntary character of this liability might check the tendency of some courts to extend the scope of the necessaries, for which the husband must pay, to an unreasonable extent. Thus, a clear and conscious recognition of the true nature of this liability will make it more beneficial to the wife and at the same time prevent the burden to the husband becoming unreasonable and unfair.

As to the enforcement of the duty, this seems no longer a real problem. No doubt the common law method of indirect action through merchants was ridiculously ineffective. But the state has interfered not only through criminal statutes, but also, when necessary, by statutes permitting direct actions for support. The latter form of action, however, as well as the less radical but quite effective action for reimbursement, have in most jurisdictions been worked out by the courts without legislative aid. With all these various forms of proceeding available to her, the wife who is not able to compel her husband to support her seems to be in a situation where the law cannot reasonably be expected to help her. After many difficulties and not a few false starts, this problem of compelling the husband to furnish reasonable support to the wife seems to be well on the road to a satisfactory solution.

Robert C. Brown.

UNIVERSITY OF INDIANA.